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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALTON B. HORNBACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALTON B. HORNBACK
Petitioner, Pro Se
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22 February 1994

26 pp

I

QUESTIONS PRESENTED

1. Is CLASSIFIED information in a patent application U.S. Government property?

2. Does the acquisition, by the U.S. Government, of a "proprietary interest" in privately developed information as a prerequisite to its classification, constitute an eminent domain "taking" of that information?

3. Can the U.S. Government lawfully deprive a U.S. citizen of the right to disclose, and to possess, the privately developed information <u>in his own patent application</u>, while it retains physical possession of, and the right to use, that same information, but without awarding "just compensation" for the Fifth Amendment "taking" of the intellectual property rights to that information?

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The petitioner, Alton B. Hornback, respectfully prays that a writ of certiorari issue to review the DECISION of the United States Court of Appeals for the Federal Circuit.

II

JURISDICTION

1. This PETITION FOR WRIT OF CERTIORARI is submitted pursuant to Rule 10.1(c).

2. Date of entry of judgement to be reviewed: 22 December 1993, (Appendix A).

3. Date rehearing denied: 25 January 1994, (Appendix B).

4. This Court has jurisdiction to review the judgement in question pursuant to 28 U.S.C. §1254.

III

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND AUTHORITIES

1. Fifth Amendment, (Pertinent Text)

> [n]or shall private property be taken for public use, without just compensation.

2. 35 U.S.C. §181. Secrecy(1) of Certain Inventions and Withholding of Patent, (Pertinent Text)

> If, in the opinion...of the Secretary of a Defense Department...the publication or disclosure of the invention by the granting of a patent therefor would be

(1) This is irrelevant to the classification of SECRET within the meaning of E.O. 12356.

detrimental to the national security...the Secretary of a Defense Department...shall notify the Commissioner and the Commissioner shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires and notify the applicant thereof.

3. 35 U.S.C. §183. Right to Compensation, (Pertinent Text)

An applicant...whose patent is withheld...shall have the right...to apply to the head of any department or agency who caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from his disclosure...A claimant may bring suit against the United States...in the District Court of the United States of the district in which such claimant is a resident for an amount which...shall constitute just compensation for the damage and/or use of the invention by the Government.

4. 32C.F.R. §159a.15(e)(3)

A product of nongovernment research and development that does not incorporate or reveal classified information to which the producer or developer was given prior access may not be classified until and unless the government acquires a proprietary interest in the product. This prohibition does not affect the provisions of the Patent Secrecy Act of 1952.

5. Executive Order 12356, (Excerpts)

(a) Definition of "National Security (CLASSIFIED) Information

6.1(b) "Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

6.1(c) "National security information" means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(b) Definition of SECRET Classification

1.1a(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

6. Industrial[2] Security Manual for Safeguarding Classified Information (ISM), (Pertinent Text)

---

(2) The ISM is geared exclusively to the "military-industrial complex"; it makes no provision for a private citizen to possess, disclose, store, or transmit classified information.

(a) Section 4-105, (Excerpts)

It should be noted, however, that E.O. 12356 prohibits a User Agency from classifying information over which the Government has no jurisdiction. \The...material submitted may not be classified by a User Agency unless...the Government first acquires a proprietary interest in the information.

(b) Section 2-100(c)

Before contractors are eligible for custody (possession) of classified material, in addition to an FCL, they must have proper storage capability approved by the CSO and be prepared to apply other safeguards as required by this Manual.

(c) Section 5-513, (Excerpts)

Contractors may disclose classified information during visits provided the visit is necessary for a government purpose; the parties involved possess the appropriate clearances and have a need-to-know for the classified information; appropriate security measures are taken as necessary to preclude unauthorized disclosure of classified information; and the number of classified visits is held to a minimum consistent with contractual requirements.

7. Secrecy Orders, (Pertinent Text)

(a) 1987-1993, (Excerpts)

Publication or disclosure of the subject matter of the above-identified patent application...may subject the

person publishing or disclosing the subject matter to the penalties of 35 U.S.C. 182, 185 and 186 (1951).

The subject matter of the above-identified application has been determined to be encompassed by...E.O. 12356...and thus is subject to the (ISM).

(b) Current, 1993--, (Excerpts)

The subject matter of this application is:

[X] CLASSIFIED
at the level of: SECRET

[ ] Not classified
but would ...
be CLASSIFIABLE(1)
at the level of: _____

Footnote

(1) The term "classifiable" as used herein designates subject matter that is not actually classified but is considered sufficiently sensitive...to have been properly classified under E.O. 12356 if the subject matter were owned by the U.S. government.

IV

STATEMENT OF CASE AND PERTINENT FACTS

1. On 25 April 1986, Petitioner filed with the Patent and Trademark Office (PTO) a patent application, S/N 06/859,033 titled "Real Time Boresight Error Slope Sensor" -- a device to improve the cost/effectiveness of a missile such as the Patriot which uses a radar terminal homing seeker, or the HARM when used against moving targets.

2. On 16 April 1987, the U.S. Air Force classified the subject matter in that application at the level of SECRET pursuant to E.O. 12356. That subject matter remains so classified.

3. On 27 May 1987, the PTO issued a document stating that, except for classification markings, the application was in condition for allowance.

4. On 24 August 1987, the PTO issued a SECRECY ORDER on the application stating that the subject matter was encompassed by E.O. 12356 and its implementing directive, the

"Industrial Security Manual for Safeguarding Classified Information" (ISM). The SECRECY ORDER remains in effect.

5. On 28 August 1987, Petitioner filed an administrative claim with the U.S. Air Force, pursuant to 35 U.S.C. §183, for $10,000,000.

6. On 17 September 1987, the PTO issued a NOTICE OF ALLOWABILITY stating that "...in view of the secrecy order issued August 24, 1987 under 35 U.S.C.(1952) 181, this application will be withheld from issue during such period as the national interest requires".

7. On 29 January 1988, Petitioner lost his security clearance (top secret, secret, confidential) solely as a result of retirement.

8. On 29 September 1988, the administrative claim was denied.

9. On 22 December 1989, suit was filed in District Court pursuant to 35 USC 183. On 2 October 1992, District Court granted the

Government's MOTION FOR SUMMARY JUDGEMENT, effectively dismissing the case. On 15 October 1992, Petitioner moved for RECONSIDERATION. On 18 December 1992 that motion was denied.

10. On 14 January 1993, Petitioner filed NOTICE OF APPEAL in U.S.Court of Appeals for the Ninth Circuit. Appeal was transferred to U.S. Court of Appeals for the Federal Circuit on 16 July 1993. On 22 December 1993, the Federal Circuit Court of Appeals affirmed District Court's ORDER GRANTING SUMMARY JUDGEMENT, (Appendix A). And on 29 December 1993 Petitioner filed PETITION FOR REHEARING. On 25 January 1994 that PETITION was denied, (Appendix B).

11. Basis for Federal Jurisdiction in Court of First Instance

The statutory basis for this action in district court is 35 U.S.C. §183. The basis for jurisdiction in the District Court in the Southern District of California is that Petitioner is now, and for the past 32 years

has been, a legal resident of San Diego County, California, which is encompassed by the Southern District of California.

V

ARGUMENT

The current SECRECY ORDER specifies that the subject matter in Petitioner's patent application is CLASSIFIED SECRET, as opposed to being simply "classifiable". It goes on to define "classifiable" subject matter as "subject matter that is not actually classified but is considered sufficiently sensitive...to have been properly classified under E.O. 12356 if the subject matter were owned by the U.S. government". (emphasis added). This indicates that information which has actually been CLASSIFIED is, ipso facto, "owned by the U.S. government". This interpretation is reinforced by the requirement in both Section 4-105 of the ISM and 32 C.F.R. 159a.15(e)(3) that privately developed information may not be classified unless the Government first acquires a

"proprietary interest" in that information. Accordingly, Petitioner contends that the SECRECY ORDER, the ISM, and the C.F.R. all provide authority for an eminent domain "taking" claim within the framework of 35 U.S.C. §183 and that that "taking" is the damage caused by the SECRECY ORDER.

Despite the fact that the subject matter has been classified SECRET and the patent withheld for over 6 years, the Government, nevertheless, argues that Petitioner is not entitled to any compensation whatsoever, because: (i) there was no "taking" because the Government lacks jurisdiction over privately developed information, and therefore, the classification was invalid, (ii) a Fifth Amendment "taking" argument is inappropriate because 35 USC 183 provides the exclusive remedy for damage caused by a secrecy order, and (iii) case law requires a showing of "actual" damage for recovery under 35 USC 183. With that first argument, all eminent domain <u>condemnations</u> would be invalid!

Moreover, the SECRECY ORDER, which is based on that alleged invalid classification, has been renewed each year since 1987.

VI

REASONS FOR ALLOWANCE OF WRIT

Over 100 years ago, in James v. Campbell (1882) 104 US 356 26L Ed 786, the court held: "United States could not appropriate or use invention without just compensation, in any different way than it could appropriate or use any other article owned by a private citizen". Also in Leesona Corp. v. United States (1979) 220 Ct.Cl. 234, 599 F.2d 958, the court held: "[w]hen the government has infringed, it is deemed to have 'taken' patent license under eminent domain theory, and compensation is just compensation required by Fifth Amendment". However, no precedent has been cited which addresses the issue of the acquisition of a "proprietary interest" in the information in a patent application as a prerequisite to its classification.

Although the DECISION by Appeals Court

makes frequent reference to the secrecy order, it is totally devoid of any language addressing the cardinal issue of classification, including the very fact of the classification itself. This, together with the absolute silence by both Appeals Court and District Court regarding Executive Order 12356, suggests that the issue of classification and the acquisition of a "proprietary interest" in privately developed information as a prerequisite to that classification were too onerous for either lower Court to handle. The Courts here must do much more than simply take "judicial notice" of an executive order; the secrecy order, by an Act of Congress, provides for heavy civil and criminal penalties for violation of Executive Order 12356.

If that DECISION is allowed to stand, the Government henceforth will be able, indefinitely, to appropriate and use any invention described in a pending patent application while circumventing the "just

compensation" clause of the Fifth Amendment by using the following four-step procedure: (i) Classify that patent application pursuant to E.O. 12356 before applicant has expended funds otherwise recoverable as "actual" damage and, with that classification, insure that an uncleared applicant can not prove unauthorized use. (ii) Impose a secrecy order on that application pursuant to 35 U.S.C. 181 which prohibits, under heavy civil and criminal penalties, an uncleared inventor from possessing or disclosing the information in his own patent application, and which withholds the patent from issue "during such period as the national interest requires". (iii) Argue that a Fifth Amendment "taking" argument is inappropriate because 35 U.S.C. §183 provides the exclusive remedy for damage caused by a secrecy order. (iv) And then assert that applicant has shown no proof of use or "actual" damage allegedly required by 35 U.S.C. §183 - a fact guaranteed by the Government's preemptive strike in Step (i).

With the foregoing procedure the Government, for over 6 years, has successfully avoided the payment of any compensation whatsoever to Petitioner for his valuable contribution to the science of missile guidance.

WHEREFORE, this Petitioner respectfully pleads for the mercy of this Court to reverse the DECISION of the U.S. Court of Appeals for the Federal Circuit dated 22 December 1993 which grants the United Stated Government a license to circumvent the "just compensation" clause of the Fifth Amendment whenever that Government wishes to appropriate or use an invention described in a pending patent application.

Date 22 February 1994 Alton B Hornback

Alton B. Hornback
Petitioner, Pro Se

VIII

APPENDIX

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A.	DECISION, U.S. Court of Appeals for the Federal Circuit, Dated 22 December 1993 ----------	a2
B.	ORDER DENYING REHEARING Dated 25 January 1994----------	a6

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

93-1462

ALTON B. HORNBACK,

Plaintiff-Appellant

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: December 22, 1993

Before ARCHER, Circuit Judge, COWEN, Senior Circuit Judge, and MAYER, Circuit Judge.

PER CURIAM

DECISION

Mr. Hornback appeals from an order of the United States District Court for the Southern District of California, entered October 2, 1992, in Civil Action No. 89-1914-R-(M), which dismissed his complaint and granted summary judgment in favor of the

United States. On December 18, 1992, the district court denied Hornback's motion for reconsideration of the order granting summary judgment (Civil Action No. 89-1914-R(P).

In April, 1986, the United States Patent and Trademark Office (PTO) received a patent application for a missile guidance system designed by Hornback. At the request of the Air Force, the PTO issued a secrecy order on Hornback's patent application on August 24, 1987. The secrecy order is still in effect and prohibits the publication or disclosure of the subject matter of the application to any person, except those specifically authorized in the order or those having the requisite clearances on a need-to-know basis.

In August, 1987, Hornback submitted a claim to the Air Force under 35 U.S.C. §183, for damages allegedly caused by the secrecy order. The claim was denied on September 29, 1988.

Hornback then filed his complaint in the

district court under 35 U.S.C. §183 for use of the invention and also for damages caused by the secrecy order. Under a stipulation which was incorporated in the court's order, Hornback formally elected not to pursue his claim for use of his invention by the United States for as long as the secrecy order imposed on his pending patent application remains in effect. As a result, the parties agreed that the action in the district court would proceed solely on Hornback's claim for damages allegedly caused by the secrecy order.

The district court held: (1) Mr. Hornback failed to present a genuine issue of fact regarding the damages claimed by him, and (2) his Fifth Amendment taking argument is inappropriate, because 35 U.S.C. §183 provides the exclusive remedy to inventor-owners for damages claimed as the result of a secrecy order imposed by the government.

After a careful review of the record in this case, we affirm the decision of the district court on the basis of the district court's order of October 2, 1992.

93-1462

APPENDIX B

United States Court of Appeals
for the Federal Circuit

O R D E R

Before ARCHER, Circuit Judge, COWEN, Senior Circuit Judge, and MAYER, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue February 1, 1994.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

by /s/
Diane M. Frye
Chief Deputy Clerk

Dated: January 25, 1994

cc: ALTON B. HORNBACK
EDWARD H. RICE

STAMP
Jan 25 1994

HORNBACK V US, 93-1462
(DCT - 89-CV-1914)

****

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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SUPPLEMENTAL APPENDIX

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2 March 1994

SUPPLEMENTAL APPENDIX

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C. ORDER GRANTING SUMMARY JUDGMENT--- a8

APPENDIX C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALTON B. HORNBACK, Plaintiff, v. UNITED STATES OF AMERICA Defendant.	CIVIL NO. 89-1914-R(M) ORDER GRANTING SUMMARY JUDGMENT

Plaintiff Alton Hornback brought this action under 35 U.S.C. §183, a statute which provides a remedy for inventors whose patents are restricted by government secrecy orders.

Background

Plaintiff is a retired scientist who, while working for McDonnell Douglas Astronautics Company ("MDAC"), invented a missile guidance device referred to as a "Real Time Boresight Error Slope Sensor" (hereafter "Sensor"). According to

plaintiff, this device "senses in real time the boresight error slope for a missile with a radar-guided homing device." Complaint at 2.

At the time of its invention, the Sensor was classified "Secret" by MDAC and could be disseminated only on a need-to-know basis by or to persons holding adequate security clearances. MDAC was not interested in developing the technology and released its rights in the device to Plaintiff on March 13, 1986.

In April 1986, the United States Patent and Trademark Office received from MDAC a patent application--designated "Secret" by MDAC--for Plaintiff's Sensor.

On August 24, 1987, the Patent Office issued a secrecy order on the application at the request of the Air Force. This secrecy order--which remains in place today--prohibits the publication or disclosure of the subject matter of the

application to any person except those specifically authorized in the order or those having the requisite clearances on a need-to-know basis.

On September 17, 1987, the Patent Office indicated that the patent application was in condition for allowance, but stated that the patent would not be issued while the application remained under a secrecy order.

In August 1987, Plaintiff submitted a claim to the Air Force under 35 U.S.C. §183 for damages allegedly caused by the secrecy order. Plaintiff's claim was denied on September 29, 1988.

In 1989 and 1990, plaintiff sent unsolicited proposals to several defense contractors in an effort to sell his rights in the Sensor. All were rejected. None of the rejections mentioned the secrecy order as a factor in the rejection.

To date, the Sensor has neither been constructed nor tested to verify that it operates as Plaintiff predicts in his patent specification.

Plaintiff brought this action under 35 U.S.C. §183 for damages for use of the invention and for damages caused by the secrecy order. Under Stipulation and Order of the Court of February 19, 1992, Plaintiff waived his use claim pending the recision of the secrecy order and issuance of his patent. Thus, this Order rests solely on damages resulting from the secrecy order.

Legal Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56.

Once the movant has met the initial burden of demonstrating no issue of material

fact, the burden shifts to the party resisting the motion who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." Id. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250.

To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

A moving party is entitled to judgment as a matter of law if the nonmovant fails to make a sufficient showing of an element of

its case with respect to which it has the burden of proof. Id.

Discussion

Here, Defendant United States ("Government") has met its initial burden by demonstrating that no issue of material fact has been raised. In his opposition brief to this Motion for Summary Judgment and at the hearing on this Motion, Plaintiff did not argue genuine issues of material fact. Instead, Plaintiff merely argued that he is entitled to damages notwithstanding settled precedent on the relevant issues.

Unfortunately for Plaintiff, however, the case law discussing 35 U.S.C. §183 dismisses all of Plaintiff's arguments. No factual claims remain, and Summary Judgment is therefore appropriate.

Actual Damages

Section 183 requires that a plaintiff

demonstrate actual damages or "concrete evidence of damages" to recover for harm allegedly stemming from a secrecy order. Constant v. United States, 1 Cl.Ct. 600 (1982), aff'd, 714 F.2d 162 (Fed. Cir. 1983), cert. denied, 464 U.S. 1041 (1984) (Constant II). Constant II also involved an inventor suing under §183.

The court in Constant II noted that the plaintiff's evidence consisted solely of his own uncorrobated testimony that the secrecy order impeded his ability to market his invention. Id. at 606. The court concluded that

> These conjectural and speculative claims must be rejected in toto. Apart from plaintiff's own conclusory ipse dixit testimony, the record is devoid of any probative evidence tending to show that the companies alleged to be potential "customers" were interested in plaintiff's unsolicited proposals, or that the secrecy order interfered with the plaintiff's attempts to sell his system. . . .

Id. at 607.

As in Constant II, plaintiff here does not offer any proof of actual damages. Instead, he states that "actual" damages are unnecessary in light of the "severe and total damage" he has allegedly suffered. Opposition to Motion for Summary Judgment at 2. Additionally, Plaintiff gives only his own rough estimate of the money the government would save on missiles if his Sensor were used, and then speculates what his share of the royalties would be. Plaintiff's speculation is insufficient to establish an issue of material fact to defeat the Motion for Summary Judgment.

Plaintiff has similarly proffered no evidence of actual damages resulting from the secrecy order. Plaintiff has presented no proof beyond his own assertion that his Sensor would be of interest to any defense contractor or the United States military, the admitted extent of possible customers.

Furthermore, Plaintiff has not

demonstrated that the alleged harm has been caused by the secrecy order. For example, not one of the rejection letters he received from a defense contractor mentions the secrecy order as a reason for not pursuing Plaintiff's invention. For this reason, the Plaintiff has failed to present a genuine issue of material fact regarding damages.

Fifth Amendment Taking Argument

Plaintiff argues that he is the victim of a compensable taking propagated by the government and claims that "the triable issue of fact is . . . the severe and total damage defined by the eminent domain 'taking' of Plaintiff's property. . ." Opposition to Motion for Summary Judgment at 2.

Again, case law does not support Plaintiff's position. The court in Constant v. U.S., 16 Cl.Ct. 629 (1989), aff'd, 884 F.2d 1398 (Fed. Cir.), cert. denied, 493

U.S. 1002 (1989) (Constant III), held that 35 U.S.C. §183 is an exclusive remedy for parties in plaintiff's position and that a Fifth Amendment taking argument is therefore inappropriate. Id. at 632.

Despite his lack of a taking claim in his complaint, Plaintiff asserts such a claim in his opposition. In his brief, Plaintiff attempts to distinguish the Constant III holding by stating that (1) the opinion is "too weasel worded," (2) the facts are not 100% identical, and (3) plaintiff would have tried the Constant case differently, so he should not be bound by the precedent. Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Motion for Summary Judgment at 5-8. Despite these objections, Constant III is directly on point and therefore dispositive of the issue.

Lack of Reliance on Government Misstatement

At the hearing for this Motion, Plaintiff raised the issue of reliance on a misstatement of the law in a letter he received from the Defense Investigative Service. The letter, signed by William R. Stedman, incorrectly quoted the Industrial Security Manual for Safeguarding Classified Information (ISM). Plaintiff included the misstatement in his own brief and claimed he relied to his detriment on the misstatement.

In response to questions from this Court, Plaintiff admitted that he had filed this suit, in addition to his administrative claim, before he had received the erroneous quotation from the Defense Investigative Service. Plaintiff also stated that he is now aware that the quotation was incorrect and that he currently has a copy of the ISM in his possession.

No issue of estoppel is raised by plaintiff's argument and the Court's findings are unaffected by this issue.

Conclusion

This court finds that Defendant United States of America has met the requirements of Rule 56. The Government has demonstrated that no genuine issue of material fact remains and that there is an absence of evidence to support Plaintiff's case.

Plaintiff has failed to make a sufficient showing on any genuine issue of material fact and has proffered no evidence of actual damages. Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED:

DATE: 10-1-92

STAMPED

JOHN S. RHOADES
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

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